

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 51

[CC Docket No. 01–338; CC Docket No. 96–98; CC Docket No. 98–147; FCC 03–36]

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document initiates an inquiry regarding proposed modifications to the Commission's existing rules implementing section 252(i) which requires local exchange carriers (LECs) to make available to other telecommunications carriers interconnection agreements approved under section 252.

DATES: Comments are due October 2, 2003 and Reply Comments are due October 23, 2003. It is also available on the Commission's Web site at <http://www.fcc.gov>.

FOR FURTHER INFORMATION CONTACT:

Robert Tanner, Attorney-Advisor, Wireline Competition Bureau, at (202) 418–1580 or via the Internet at rtanner@fcc.gov. The complete text of this Notice of Proposed Rulemaking (NPRM) is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. Further information may also be obtained by calling the Common Carrier Bureau's TTY number: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in WC Docket No. 01–338, FCC 03–36, adopted February 20, 2003, and released August 21, 2003. This full text may be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–863–2893, facsimile 202–863–2898, or via e-mail qualexint@aol.com.

Synopsis of the Notice of Proposed Rulemaking (NPRM)

1. The Commission seeks comment on whether to alter its interpretation of section 252(i) to promote more meaningful commercial negotiations. The Commission tentatively concludes that modifying its current approach would better serve the goals of section 252(i) and sections 251–252 generally. The Commission also incorporates into this docket a related Petition for

Forbearance and Rulemaking filed by Mpower Communications ("Mpower Petition") and the comments and *ex partes* filed in response to the Mpower Petition. See *Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick-and-Choose"*, CC Docket No. 01–117, Petition for Forbearance and Rulemaking (May 25, 2001).

2. In the *Local Competition Order*, (61 FR 52706, October 8, 1996) the Commission adopted an interpretation of section 252(i) of the Act that required incumbent LECs to permit "third parties to obtain access under section 252(i) to any individual interconnection, service or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252." This interpretation is often referred to as the "pick and choose" rule. See 47 CFR 51.809. In its petition, Mpower argues that the current rule "inhibit[s] innovative deal-making" and has led to "a great sameness and very little meaningful choice" in interconnection agreements. Mpower and several carriers filing comments in CC Docket 01–117 propose that carriers seeking to use section 252(i) be required to adopt the entire terms and conditions of an interconnection agreement approved under section 252 rather than allow adoption of individual terms as conditions.

3. The Commission seeks comment on its legal authority to alter its interpretation of the statute in view of the Supreme Court's characterization of the Commission's current rule as "the most readily apparent" reading of the statute. *Iowa Utils. Bd.*, 525 U.S. at 396. The Commission tentatively concludes that it may adopt a different rule pursuant to section 252(i), provided the Commission's modified rule is a reasonable interpretation of the statutory text. The Commission observes that the public record in response to the Mpower petition indicates that under the current rules incumbent LECs seldom make significant concessions in return for some trade-off for fear that third parties will obtain the equivalent benefits without making any trade-off at all. The Commission invites parties to submit concrete evidence to the contrary.

4. The Commission identifies two key concerns expressed by commenters in response to the proposal put forward by Mpower to create "FLEX" contracts that would provide an alternative form of interconnection agreement outside of section 252(i) and not subject to the "pick and choose" rule. First, incumbent LECs might insert "poison

pills" into such agreements to make them unsuitable for adoption by third parties. Second, commenters argue that there is not a valid basis for exempting "FLEX" contracts from the requirement to submit interconnection agreements to state commissions for approval or from other requirements in section 252.

5. The Commission seeks comment on a proposal described as follows: If an incumbent LEC does not file and obtain state approval for a statement of generally available terms and conditions (SGAT) the current pick and choose rule would continue to apply to all of that incumbent LEC's interconnection agreements. If an incumbent LEC does file and obtain state approval for an SGAT, the current pick and choose rule would apply solely to the SGAT and all other interconnection agreements entered into by that incumbent would be subject to an "all-or-nothing" rule requiring third parties to adopt the interconnection agreement in its entirety. The Commission notes that the Act only requires Bell Operating Companies (BOCs) to file SGATs and it seeks comment on whether it should apply the above approach to non-BOC incumbent LECs as well. The Commission also seeks comment on whether the SGAT condition, together with preservation of the Act's good faith obligation and non-discrimination safeguards be sufficient to prevent the above described proposal from eviscerating the obligation Congress imposed in section 252(i).

6. The Commission seeks comment on whether the above described proposal would be workable for all classes of carriers, including smaller competitive LECs. The Commission seeks comment on whether there are other means of restoring the Congressional goal of meaningful marketplace negotiations, including modifications to the above described proposal.

Initial Regulatory Flexibility Analysis

7. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are sought on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the NPRM and IRFA (or